

The Honorable John H. Chun

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AMAZON.COM, INC.,

Defendant.

No. 2:23-cv-0932-JHC

**JOINT STATEMENT OF
DISPUTES REGARDING
PROTECTIVE ORDER**

I. INTRODUCTION

Pursuant to the Court's Order [Dkt. 14], the FTC and Amazon have met and conferred regarding the entry of a protective order governing (1) the treatment of documents, testimony, and other information provided to the FTC by Amazon or any third-party submitter prior to the filing of this action, and (2) the exchange in discovery of documents that a party deems confidential. Over the past month, the parties have conferred by teleconference and exchanged proposals and revisions to the Western District of Washington's Model Stipulated Protective Order consistent with the Court's Order and LCR 26(c)(2).

In its Order, the Court stated "the parties shall submit a joint stipulated proposed protective order or, if the parties are unable to reach an agreement, two separate proposed protective orders accompanied by a joint submission describing each party's justification for its proposal." *Id.* The parties have reached agreement on substantially all of the terms of a proposed protective order. Two proposed terms, however, remain disputed. Accordingly, the parties submit this joint statement outlining their disagreements on provisions of the protective order to be entered. Along with this joint statement, the parties are providing:

- **Exhibit A:** A redline showing the parties' stipulated proposed revisions and the FTC's additional proposed revisions to the Western District's model order.
- **Exhibit B:** A redline showing the parties' stipulated proposed revisions and Amazon's additional proposed revisions to the Western District's model order.
- **Exhibit C:** A redline showing the FTC's remaining suggested revisions to Amazon's proposed protective order that Amazon did not accept, i.e. the remaining disputed terms between the FTC and Amazon.

The parties will also provide the Court with Word versions of their respective proposed protective orders.

II. THE PARTIES' POSITIONS

1. Section 5.3 (Disclosures to Governmental Entities)

A. Text of FTC's Proposed Section 5.3:

5.3 Disclosures to Governmental Entities. Notwithstanding the limitations set forth in Section 5.2 and subject to taking appropriate steps to preserve confidentiality, Plaintiff may disclose Confidential Material and Sensitive Personal Information to other governmental entities, in the manner provided by 16 C.F.R. §§ 4.9-4.11, 15 U.S.C. §§ 46(f), 57b-2. Such entities include officers and employees of Federal or State law enforcement agencies (including duly authorized employees of Plaintiff) and congressional committees. Any officers or employees of Federal or State law enforcement agencies who will have access to such materials must maintain them in confidence, use them only for official law enforcement purposes, and sign the "Acknowledgement and Agreement to Be Bound (Government Entity)" (Exhibit B). Plaintiff shall provide a copy of the signed Exhibit B to Defendant prior to providing any Confidential Material to a Federal or State law enforcement agency unless the agency requests that Defendant not be notified. Nothing in this subsection shall limit Plaintiff's ability to share ROSCA Investigation Material or Other Investigation Material with other governmental entities, as provided by 16 C.F.R. §§ 4.9-4.11, 15 U.S.C. §§ 46(f), 57b-2, or as otherwise authorized or required by law, even if such material is designated as Confidential Material under this Order.

B. Text of Amazon's Amazon's Proposed Section 5.3:

5.3 Disclosures to Governmental Entities. Notwithstanding the limitations set forth in Section 5.2 and subject to taking appropriate steps to preserve confidentiality, Plaintiff may disclose Confidential Material and Sensitive Personal Information to other governmental entities, in the manner provided by 16 C.F.R. §§ 4.9-4.11, 15 U.S.C. §§ 46(f), 57b-2 as if the Confidential Material was obtained pursuant to an investigation as contemplated by these sections. Such entities include officers and employees of Federal or State law enforcement agencies (including duly authorized employees of Plaintiff) and congressional committees. At least 14 days before disclosing any Confidential Material or Sensitive Personal Information to such entities, Plaintiff

1 must provide notice to Defendant of the material(s) to be disclosed and the identities of the
 2 individuals who will have access to such materials. The individuals who will have access to
 3 such materials sign the “Acknowledgement and Agreement to Be Bound (Government Entity)”
 4 (Exhibit B). Plaintiff must also provide copies of the executed Acknowledgement and
 5 Agreement to be Bound in full at least 14 days before the disclosure.

6 **C. The FTC’s Position:**

7 Amazon has agreed to a version of Section 5.3 that permits the FTC to share information
 8 obtained in discovery with law enforcement agencies and Congress, but argues (1) the FTC
 9 should be required to disclose the existence of other agencies’ nonpublic law enforcement
 10 investigations when doing so, and (2) the Court should bind members of Congress and their
 11 staffers to the terms of the Protective Order. Because Amazon cannot establish good cause for
 12 either restriction, the FTC respectfully requests entry of its proposed Protective Order. *See* Fed.
 13 R. Civ. P. 26(c)(1) (Court may enter protective order “for good cause”); *Trade Associates Inc. v.*
 14 *Fusion Techs., Inc.*, 2010 WL 11530556, at *1 (W.D. Wash. Sept. 29, 2010) (to establish “good
 15 cause” for protective order, party must “demonstrate that ‘specific prejudice or harm will result if
 16 no protective order is granted’” (quoting *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1210
 17 (9th Cir. 2002))).

18 First, Amazon requests that, where a law enforcement agency asks the FTC to keep its
 19 information request confidential, the FTC must choose between not providing the information and
 20 providing the information but disclosing the agency’s request (which, in many cases, would
 21 disclose the existence of nonpublic law enforcement investigation). Amazon’s proposal is
 22 improper because it could compromise the confidentiality of other agencies’ investigations. It
 23 would also interfere with Congress’s effort “to make it crystal clear that the Commission has this
 24 authority [to share information with law enforcement agencies] and that it should be able to
 25 exercise it without undue delay and restraint.” *Fleming v. FTC*, 670 F.2d 311, 315 (D.C. Cir.
 26 1982); *see also* 15 U.S.C. § 46 (allowing such sharing not only in the context of information
 27 obtained in FTC investigations, but also in *any* circumstance in which the Commission learns of

1 potential criminal violations (*see* 15 U.S.C. § 46(k)(1)). Amazon asserts it “should” be entitled to
2 notice when its information is shared, but does not meet its burden of showing that any specific
3 prejudice or harm will result in the absence of notice. In fact, given the confidentiality restrictions
4 that the FTC’s proposed Section 5.3 already imposes on the agency receiving information—
5 including that such agencies must maintain the information in confidence and only use it for
6 official law enforcement purposes—there is no meaningful risk of harm. Additionally, Amazon’s
7 argument that a notice requirement would not “burden” the FTC is beside the point. The issue is
8 not burden; it is the disclosure of otherwise-confidential investigations.

9 Second, Amazon argues that “other governmental entities”—*i.e.*, Congress—should be
10 bound by the terms of the Protective Order, which would subject Congress to this Court’s
11 jurisdiction when performing its oversight functions. This request raises significant separation-of-
12 powers concerns, and, at a minimum, Amazon cannot establish good cause for restricting Congress
13 in this manner. In any event, the FTC regulations incorporated in the FTC’s proposed Section 5.3
14 provide adequate protection to Amazon. Specifically, when the FTC receives a request for
15 “nonpublic material” from Congress (regardless of whether the FTC obtained that nonpublic
16 material during an investigation or litigation), it must give notice to Amazon of the request and
17 must inform Congress that Amazon considers the requested information confidential. 16 C.F.R.
18 § 4.11(b).

19 Finally, the other discrepancies between the parties’ proposed Sections 5.3 should be
20 resolved in favor of the FTC. First, by restricting all “Confidential Material,” Amazon’s proposed
21 Section 5.3 could be read to impose new restrictions on the sharing of information the FTC
22 obtained during its investigation preceding this lawsuit, where Amazon designates such
23 information “Confidential” under the Protective Order. There is no basis to add new restrictions
24 on information already obtained, which under the FTC Act and applicable regulations the FTC is
25 expressly permitted to share with other government agencies. *See* 15 U.S.C. § 57b-2(b)(6), (d)(1)
26 (permitting sharing with other law enforcement agencies and Congress, with no temporal
27 restriction); 16 C.F.R. § 4.11(b), (c) (same). The FTC’s proposed final sentence of Section 5.3

1 confirms that there are no such restrictions. Second, the FTC has agreed to Amazon's request that
2 law enforcement agencies sign an agreement to be bound by Section 5.3 of the Protective Order
3 (Exhibit B), but opposes Amazon's request for the agencies to be bound by the entire Protective
4 Order. Amazon's proposal would result in uncertainty for agencies because it is unclear how most
5 of the Protective Order's provisions would apply outside of the context of this litigation.
6 Therefore, the FTC respectfully requests the Court adopt its proposed Exhibit B.

7 **D. Amazon's Position:**

8 The FTC is mistaken regarding the scope of the FTC's authority to share confidential
9 information with other law enforcement agencies. The FTC's authority in support of its position
10 refers to confidential materials obtained in investigations, not in civil discovery. *See* 15 U.S.C. §
11 57b-2(b) ("With respect to any document, tangible thing, or transcript of oral testimony received
12 by the Commission pursuant to compulsory process in an investigation ... the procedures
13 established in paragraph (2) through paragraph (7) shall apply"). These provisions ceased to
14 apply when the FTC ended its investigation and brought suit in federal court. Notwithstanding
15 that the FTC is no longer entitled to share these documents with other law enforcement agencies
16 as of right, Amazon is willing to compromise provided the FTC can ensure that Amazon's
17 documents are adequately protected. To this end, Amazon has included additional safeguards
18 that would allow for the sharing the FTC requested while protecting Amazon's confidential
19 materials. Specifically, Amazon proposes that any parties receiving such documents would be
20 required to sign Enclosure B to Amazon's proposed protective order. Enclosure B would bind
21 any agency to most of the provisions in the protective order without restricting the use of the
22 materials to the present litigation. Although the FTC is willing to agree to bind any federal and
23 state law enforcement agencies to most terms of the protective order, the FTC is not willing to
24 bind any other governmental entities. The Court should adopt Amazon's proposal on this issue
25 which would require any governmental entity to which the FTC wishes to disclose Confidential
26 Material to first sign Enclosure B to Amazon's proposed protective order.
27

1 In addition, Amazon should be entitled to some notice of which documents are shared
 2 and with whom. The FTC is willing to agree to allow Amazon to receive notice before
 3 documents are shared *unless* the receiving agency requests that Amazon not be notified, which
 4 would render the notice provision effectively a nullity. Amazon's proposed request for such
 5 notice does not impose a high burden, as it does not include disclosures regarding the existence
 6 of a confidential investigation, but merely requests the name of the entities and the identity of the
 7 documents. Furthermore, this proposal gives Amazon adequate notice to protect its sensitive
 8 documents without implicating any policy concerns regarding the confidentiality of law
 9 enforcement investigations.

10 **2. Section 11 (Non Termination and Return of Documents)**

11 **A. Text of Relevant Portion of FTC's Proposed Section 11:**

12 Within 90 days after the termination of this action, including all appeals, each receiving
 13 party must return all Confidential Material to the producing party, including all copies, extracts
 14 and summaries thereof. Alternatively, the parties may agree upon appropriate methods of
 15 destruction.

16 **B. Text of Relevant Portion of Amazon's Proposed Section 11:**

17 Within 90 days after the termination of this action, including all appeals, each receiving
 18 party must return all Confidential Material to the producing party, including all copies, extracts
 19 and summaries thereof. Alternatively, the parties may agree upon appropriate methods of
 20 destruction.

21 The Receiving Party must submit a written certification to the Producing Party (and, if
 22 not the same person or entity, to the Designating Party) by the 90-day deadline that affirms that
 23 the Receiving Party has used reasonable efforts to destroy copies, abstracts, compilations,
 24 summaries or any other format reproducing or capturing any of the Protected Material.

25 **C. The FTC's Position:**

26 Amazon cannot establish good cause for its proposed insertion of a certification-of-
 27 destruction requirement in Section 11. Even absent this requirement, the Protective Order

1 already subjects the parties to contempt sanctions if they do not comply with the substantive
 2 requirements of Section 11. The Court’s Model Protective Order recognizes that no further
 3 protection is necessary, and Amazon does not argue otherwise. *See Kater v. Churchill Downs*
 4 *Inc.*, 2020 WL 13490764, at *1 (W.D. Wash. May 5, 2020) (“Out of the two dueling proposals,
 5 the Court agrees with Plaintiffs that Defendants have failed to explain how the Western District’s
 6 model orders will prejudice them even if they don’t fulfill every item on their wish list. . . . The
 7 model order is the model for a reason—it was drafted and approved by the judges of this district
 8 based on their collective experience managing numerous cases with confidential material.”
 9 (internal quotation marks omitted)). Amazon’s argument that the certification requirement
 10 would not burden the FTC overlooks that Amazon, not the FTC, must establish good cause for
 11 its proposed addition to the Protective Order.

12 **D. Amazon’s Position:**

13 In this Section, Amazon proposes the addition of language requiring the Receiving Party
 14 of Confidential Material to confirm that they have destroyed such material (absent an archival
 15 copy subject to the protective order) after the conclusion of this action. This addition is
 16 unremarkable. It merely requires that the FTC confirm that it is in compliance with the other,
 17 stipulated language in this section. Accordingly, the addition of this language does not impose a
 18 high burden on the FTC, and Amazon respectfully requests that the Court adopt its version of
 19 Section 11.

20 DATED this 11th day of August, 2023.

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